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THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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FEB 13 2004
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (5)

IN RE:

Peter C. Yeaple, Sr. and
Denise A. Yeaple

Debtor(s)

CHAPTER 13

BANKRUPTCY NO. 03-6064/W

ORDER DENYING MOTION TO RECONSIDER

This matter came before the Court pursuant to the Motion for Emergency Hearing and Motion of the Debtors to Reconsider and Vacate the Court's Consent Order granting 11 U.S.C. § 362 Relief entered on October 17, 2003, (hereinafter the "Motion"). Based upon the arguments presented by the Debtors, the Chapter 13 Trustee, and Citibank, N.A., as Trustee, (hereinafter "Citibank"), the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On August 5, 2003, the Chapter 13 Trustee filed a Petition to Dismiss ("Petition") Debtors' case. At the hearing held on the Petition, the Chapter 13 Trustee sought dismissal of Debtors' case because they had a prior case dismissed for non-payment, and after a significant increase in the arrearage debt owed Citibank, they filed this subsequent case in bad faith. Debtors attended the hearing of the Petition. At the hearing, the Chapter 13 Trustee withdrew his Petition after Debtors' counsel, Jason Moss, Esq. ("Moss"), advised him that Debtors would surrender the home which was subject to Citibank's mortgage. Pursuant to this agreement, on October 14, 2003, a Consent Order Modifying the Automatic Stay, (hereinafter the "Consent Order"), was issued to permit Citibank to foreclose its security interest in the Debtors' property located at 104 Wintergreen Road, Columbia, SC 29229. Debtors, through their counsel, Citibank, and the Chapter 13 Trustee agreed to the Consent Order. The subject property was scheduled for public foreclosure sale in state court on February 2, 2004. Debtors then contacted D. Chenise Wiley, Esq. ("Wiley"), prior to the sale in an effort to stay the foreclosure. By an Order of the Court, Wiley was substituted for Moss as Debtors' counsel of record.

On January 28, 2004, six days prior to the foreclosure sale, Debtors filed a Motion for Emergency Hearing and Motion to Reconsider and Set Aside the October 14, 2003 Consent Order Granting 11 U.S.C. § 362 Relief. Debtors alleged in their motion that the Consent Order should be vacated because Citibank continued to accept payments subsequent to the filing of the Consent Order, Debtors had equity in the subject property, and they had not agreed to surrender the property so that Citibank could complete foreclosure proceedings in State Court. Debtors maintained that they agreed to surrender the property, but were not aware that modification of the automatic stay as to Citibank allowed for Citibank to proceed

with foreclosure. The emergency hearing was held on January 29, 2004. Debtors, the Chapter 13 Trustee, Citibank, Moss, and Wiley attended the hearing. The Chapter 13 Trustee and counsel for Citibank each maintained at the hearing that they relied on Moss's representations to enter into the Consent Order and that it should not be vacated. No testimony was taken at the hearing.

CONCLUSIONS OF LAW

F.R.B.P. 9024 provides a basis for a party to obtain relief from a judgment or order in Bankruptcy Court. Rule 9024 maintains that "Rule 60 F.R.Civ.P. applies in cases under the Code." "In this circuit, a party seeking relief under Rule 60(b) must make a threshold showing of 'timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party and exceptional circumstances'." Huennekens v. Reczek, No. 01-1324, 2002 WL 1789773 (4th Cir. Aug. 5, 2002); In re Gailey, C/A No. 01-4640-W, slip op. at 1 (Bankr. D.S.C. May 16, 2003)(noting that the Court would not vacate a settlement order that debtors entered absent extraordinary circumstances). See also LBR 4001-1(k). Debtors filed the Motion on January 29, 2004, more than three months after the Consent Order was filed. Despite this lack of timeliness, this Court agreed to hear the Motion because all parties were present at the Motion Hearing and a foreclosure sale of the subject property was scheduled for February 2, 2004.

The determinative issue in establishing a meritorious defense for Debtors is whether or not the parties agreeing to the Consent Order had a right to rely on the representations of Debtors' counsel at the time they entered into the Order. "Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the settlement." Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984). Furthermore, "an attorney has merely by reason of his employment, the implied or apparent authority to confess judgment in the other party's favor if he acts in good faith and without fraud or collusion." Lord Jeff Knitting Co., Inc., v. Mills, 281 S.C. 374, 376, 315 S.E.2d 377, 378, (Ct. App. 1984). "If the attorney has apparent authority to confess, or consent to judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the Court or the opposing party, the sole remedy in such a case being against the attorney." Id., at 377, 315 S.E.2d at 379.

In the matter at hand, both the counsel for Citibank and the Chapter 13 Trustee had the right to rely on Debtor's original counsel by the apparent authority arising from the mere reason of his employment. The Chapter 13 Trustee stated that he would have continued to move for dismissal of the case at the September 2, 2003 hearing for the Trustee's Petition had it not been for Debtors' agreeing to surrender the property because the Chapter 13 Plan as initially proposed was not feasible. Debtors agreed to surrender the property at the September 2, 2003 hearing. Furthermore Debtors proposed the surrender in a subsequent amended plan dated September 4, 2003, which was confirmed by Order of this Court on

September 19, 2003, and in the terms of the Consent Order. Citibank reasonably relied on those orders in proceeding with its foreclosure action in state court.

Because no credible evidence of mistake, fraud, or collusion, have been presented to the Court, the Debtors cannot now claim that the Consent Order should not remain binding on all parties. The Court also notes that Debtors contend that they failed to receive notice of their amended plan, notice of the Consent Order, and notice of the foreclosure sale. However, the Court reviewed the record and has determined Debtors' address of record is correctly listed. In light of the facts disclosed on the record and that notices were sent to Debtors' address of record, the Court finds it highly improbable that Debtors' were unaware that foreclosure of their home would result from the agreement they reached with Citibank and the Chapter 13 Trustee or that they failed to receive any notice of their amended plan and the foreclosure sale.

Debtors' allegations that they have equity in the property and that they have made or tendered several payments to Citibank after the Consent Order was entered are not relevant to the issue of the apparent authority of Debtors' original counsel to enter into Consent Order. Furthermore, Debtors' current bankruptcy case *sub judice* would likely have been dismissed had the stay remained in effect as to the subject property. The record developed in this case also indicates that Debtors failed to establish a meritorious defense by demonstrating exceptional circumstances or a lack of unfair prejudice to the Chapter 13 Trustee and Citibank. See LBR 4001-1(k); *In re Gailey*, C/A No. 01-04640, slip op.

Debtors have failed to meet the requirements of F.R.B.P. 9024 and F.R.Civ.P. 60(b); therefore, the Court denies the Motion.

IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

February 18, 2004